Filed 8/3/09 In re F.M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re F.M., a Person Coming Under the Juvenile Court Law.	B211383 (Los Angeles County Super. Ct. No. NJ22636)
THE PEOPLE, Plaintiff and Respondent, v. F.M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Gibson Lee, Judge, and John C. Lawson, II, Commissioner. Affirmed in part, reversed in part, and remanded with directions.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court found that F.M. committed the crime of assault by means likely to produce great bodily injury, and that he committed the assault to benefit a street gang, rendering him punishable under Penal Code section 186.22, subdivision (b)(1)(B).[1] At the ensuing disposition hearing, the court adjudged F.M. a ward of the court, and ordered him suitably placed in a camp community program under prescribed terms and conditions of probation. The court declared F.M.'s offense to be a felony, and ordered that he may not be held in physical confinement for a period to exceed nine years. We affirm the juvenile court's finding that F.M. committed an assault by means likely to produce great bodily injury, reverse the gang enhancement under section 186.22, subdivision (b)(1)(B), and remand the cause for a new disposition hearing at which the noted gang enhancement is not considered.

FACTS

On May 25, 2007, Los Angeles Police Department Officer Eric Johnson was on patrol in a police vehicle when he saw F.M. and a cohort running toward another youth, K.P., on 14th Street in San Pedro. Officer Johnson thought that a fight might be about to happen, and pulled over to tell three young men to "knock it off." As Officer Johnson approached, watched and listened, he saw F.M. push K.P. toward the "busy" street, and saw K.P. fall down backward. When K.P. got to his feet, F.M. punched him in the face. During the assault, Officer Johnson heard F.M. make the following statements: "I know you're from One-Four Blocc [*sic*]. This is Rancho's area. I'm Ranch."[2]

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[1] All further section references to section 186.22 are to that section of the Penal Code.

[2] K.P. testified at F.M.'s juvenile proceeding. K.P. agreed that F.M. had punched him, but denied that F.M. said anything about any gangs.

In July 2007, the People filed a petition alleging that F.M. committed the crime of assault by means likely to produce great bodily injury, "a felony," and that he committed the offense with the specific intent to benefit a criminal street gang. (Welf. & Inst. Code, § 602; Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)(1)(B).) The petition was tried in July 2008, at which time the People presented evidence — primarily Officer Johnson's testimony — establishing the facts summarized above. Officer Johnson also testified as a gang expert. According to Officer Johnson, the "Rancho San Pedro" is a criminal street gang whose members are predominantly Hispanic, "One-Four Blocc" refers to the 14th Street Blocc criminal street gang whose members were predominantly Black, and the area where F.M. attacked K.P. is "claimed" by the Rancho gang as its "territory." Officer Johnson testified that had worked for a number of years on gang crimes and activities, and that, in the course of his duties, he had talked to F.M. on three occasions before the assault incident. F.M. claimed to be a member of the Rancho gang. Officer Johnson testified that the primary activities of the Rancho gang are selling narcotics, assaults with deadly weapons and witness intimidation.[3]

At the conclusion of the jurisdiction hearing, the juvenile court found that F.M. had committed the crime of assault by means likely to produce great bodily injury, and that he had committed the offense to benefit a criminal street gang. The court ordered a supplemental disposition report, took an "Arbuckle waiver," and set F.M.'s disposition hearing for August 5, 2008.

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[3] The prosecutor asked Officer Johnson whether, based on the circumstances of F.M.'s crime, he *had an opinion* that F.M. assaulted K.P. to benefit the Ranch San Pedro gang. Officer Johnson answered, yes. The prosecutor then asked Officer Johnson to give the basis for his opinion, and Officer Johnson explained the factors supporting his opinion. It does not appear to us, however, that the prosecutor ever actually asked Officer Johnson to state his opinion, and we do not see that Officer Johnson ever actually stated his opinion.

At the disposition hearing on August 5, 2008, the juvenile court adjudged F.M. a ward of the court, and ordered him suitably placed in a camp community program under prescribed terms and conditions of probation. The court declared F.M.'s offense to be a felony, and ordered that he may not be held in physical confinement for a period to exceed nine years.

F.M. filed a timely notice of appeal.

DISCUSSION

I.

F.M. contends the evidence is not sufficient to support the juvenile court's finding that he committed the assault to benefit a criminal street gang. We disagree.

The test for determining a claim of insufficiency of evidence in a criminal case is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt; a reviewing court does not reweigh the evidence or reevaluate the witnesses' credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) The same standard of review governs a claim of insufficiency of evidence in a juvenile court proceeding. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

Imposition of a gang enhancement under section 186.22 requires proof of various components. The "criminal street gang" component of a gang enhancement requires proof that (1) the gang was an ongoing organization, association, or group of three of more persons with a common name or common identifying sign or symbol; that (2) the gang had as one of its "primary activities" the commission of one or more enumerated crimes; and that (3) the gang's members either separately or as a group engaged in a "pattern of criminal gang activity." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611.) F.M. contends the People failed to present substantial evidence to support a finding that one of his gang's "primary activities" was the commission of enumerated crimes in the gang enhancement statute. (See § 186.22, subd. (e).)

We disagree with F.M.'s assessment of the evidence. During Officer Johnson's direct testimony, the prosecutor asked, "And what are [the Rancho San Pedro gang's] primary activities that you know of?" and Officer Johnson answered, "That I'm aware of, we have narcotics sales, witness intimidation, ADW, assault with deadly weapons, and we also have vehicle thefts and batteries." We are satisfied that the juvenile court could find this component of the gang enhancement allegation true beyond a reasonable doubt based on Officer Johnson's testimony.

F.M.'s reliance on *In re Alexander L., supra,* 149 Cal.App.4th 605 for a different conclusion is misplaced. In *Alexander L.*, a police officer who testified as a gang expert did not establish a foundation for his conclusions, and never specifically testified about the primary activities of the gang. (*Id.* at p. 611.) We simply have a different situation in F.M.'s current case. Officer Johnson testified to his training and experience in policing gangs, and his experience with the Rancho San Pedro gang, and he specifically testified regarding the gang's primary activities. His experience dealing with the gang, including personal conversations with members, and reviews of criminal cases involving the gang's members suffices to establish the foundation for his testimony.

II.

F.M. contends the gang enhancement under section 186.22, subdivision (b)(1)(B), must be reversed because his underlying crime — an assault by means likely to produce great bodily injury — "is not an included felony for that enhancement." We agree.

At the time F.M. assaulted K.P., section 186.22, subdivision (b)(1)(B), provided that any person who committed a felony to benefit of a criminal street gang was subject to mandatory additional and consecutive term of five years if the felony was "a serious felony . . . as defined by subdivision (c) of [Penal Code section] 1192.7." F.M. contends he cannot be punished under section 186.22, subdivision (b)(1)(B), because Penal Code section 1192.7, subdivision (c), does not define the crime of assault by means likely to produce great bodily injury to be a "serious felony." F.M.'s statutory interpretation is

correct. (*People v. Winters* (2001) 93 Cal.App.4th 273, 279-280 [not all assault crimes are defined as a serious felony under the Penal Code].)

To avoid this result, the People cite Penal Code section 1192.7, subdivision (c)(8), supplemented by a fact-based argument. The People's argument is unpersuasive. Penal Code section 1192.7, subdivision (c)(8), defines a serious felony to include any felony in which the defendant "*inflicts* great bodily injury on any person . . . ." (Emphasis added.) The problem with the People's argument is that the evidence in the record does not support a finding that F.M. actually *inflicted* great bodily injury on K.P. At best, the evidence showed that K.P. "had redness on his cheek" after being punched by F.M. This is not enough. K.P. did not suffer any kind of "significant" or "substantial" injury from F.M.'s assault. (See *People v. Cross* (2008) 45 Cal.4th 58, 63-64.)

In summary, the gang enhancement in this case must be reversed because F.M.'s assault crime did not render him subject to the punishment prescribed by section 186.22, subdivision (b)(1)(B).

III.

F.M. contends his case must be remanded for further proceedings in the juvenile court because the court "failed to explicitly declare [his] 'wobbler' offense a felony or misdemeanor" as required by Welfare & Institutions Code section 702. In light of our conclusion that the gang enhancement under section 186.22, subdivision (b)(1)(B), must be reversed, and because this means F.M. should have a new disposition hearing, F.M.'s argument regarding Welfare & Institutions Code section 702 is moot. Just for the record, however, we disagree with F.M. that the juvenile court's disposition orders are deficient.

By filing a petition which alleged that F.M. committed an assault, and that he did so to benefit a gang as punishable under section 186.22, subdivision (b)(1)(B), rather than section 186.22, subdivision (d), the People elected to prosecute F.M. for a *felony* offense. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907, fn. 18.) And, by sustaining the petition, the juvenile court necessarily found that F.M. had committed a felony offense. F.M.'s trial counsel recognized as much when arguing for probation or some other less

restrictive environment than a camp placement.[4] In short, F.M's arguments regarding compliance with Welfare & Institutions Code section 702 are off the mark because his case did not involve a "wobbler."

More importantly, we find the juvenile court *did* explicitly declare F.M.'s offense to be a felony. It did so in its minute order from the disposition hearing. For the reasons explained in the following section of this opinion, we reject F.M.'s argument that the juvenile court's explicit declaration in its minute order from the disposition hearing is not sufficient because the court did not make an explicit oral declaration at the disposition hearing itself.

IV.

F.M. contends his case must be remanded for further proceedings in the juvenile court because the court's oral pronouncement of the terms and conditions of his probation at his disposition hearing does not match up exactly with the language of the conditions of probation found in the court's minute order from the disposition hearing. We disagree.

F.M. argues reversible error exists because the juvenile court's orally pronounced conditions of probation must control over its minute order, and that "modifications" are needed to bring the two into exact synchronization. We reject F.M.'s argument because none of the published authorities he cites supports his proposition that a court's shorthand oral recital of the conditions of probation controls over more specific, written conditions of probation set forth in a minute order. The cases cited by F.M. involve inconsistencies between an oral pronouncement of a sentence and a sentence shown in a minute order.

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[4] During argument at the disposition hearing, F.M.'s counsel stated: "The court sustained the petition . . . .It wasn't this court. It was Judge Lee. But basically, *it appears to me at least that this was misdemeanor behavior and there was gang overtones so it became a felony on account of the People's filing*. [The victim] was pushed and then he was hit by [F.M.]. . . . He didn't go to the doctor or anything. *So all things being equal, it would have otherwise been filed as a misdemeanor battery except for the gang overtones . . . .*"

(See, e.g., *People v. Mesa* (1975) 14 Cal.3d 466, 471-472 [a sentence set forth in minute order and an abstract of judgment showing two prior robbery convictions modified where trial court failed to pronounce at sentencing hearing that defendant was being sentenced as a prior offender].)

But, as Division Four of our court explained in *People v. Wilshire Ins. Co*. (1977) 67 Cal.App.3d 521, 532, the question of whether a trial court's minutes take precedence over the court's oral pronouncements, or vice versa, "*is not the same in all situations*." (Emphasis added.) As we have noted, a rule of precedence is applied when a trial court denies probation and its oral pronouncement of sentence is inconsistent with its minute order from the sentencing hearing. (*People v. Mesa, supra*, 14 Cal.3d at p. 471.) F.M.'s current case does not present this type of inconsistency problem, because the juvenile court's oral pronouncement of the terms of probation is not inconsistent with its minute order; they are complementary.

V.

F.M. contends the juvenile court violated his state and federal constitutional rights in imposing the conditions of his probation at the disposition hearing. More specifically, F.M. assigns error to the juvenile court's oral pronouncement, "Do not associate with the Rancho San Pedro criminal street gang." (He cites the reporter's transcript at page 71.) According to F.M., the juvenile court's orally pronounced condition is unconstitutionally overbroad and vague because it does not include a scienter requirement. If we understand his position correctly, F.M. contends we must remand his case to the juvenile court for a new disposition hearing at which he is expressly advised not to associate with persons whom he *knows* to be gang members.

For reasons similar to those expressed in the previous section of this opinion, we reject F.M.'s claims of constitutional error. The conditions of probation set forth in the juvenile court's written minute order expressly direct F.M. not to associate with anyone "known" to be disapproved of by his parents or probation officer, and not to participate in

any "known" gang activity involving the Rancho San Pedro gang. The law does not require more. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890-892.)

To avoid such a conclusion, F.M. argues that there exists reversible error requiring further proceedings in the juvenile court because the court's orally pronounced conditions of probation control over its minute order. For the reasons explained above, we disagree. We are not convinced by F.M.'s arguments that the juvenile court's minute order cannot take precedence over the court's orally pronounced conditions of probation, particularly where, as we understand the record, the minute order provides the constitutional protections against vagueness which F.M. asserts are lacking in the court's oral pronouncement.

We reject F.M.'s challenges to the juvenile court's oral pronouncement regarding a "no drugs" condition of probation for the same reason. The court's minute order directs F.M. to stay away from places and persons whom he knows to use illegal drugs. We find overblown F.M.'s concern that the conditions of probation are "potentially dangerous to his health" because they do not specifically state that he may possess narcotics which are prescribed by a doctor. We are more than amply satisfied that F.M. will not be found in violation of the terms of his probation for possessing legally prescribed medications, and that he knows as much.

DISPOSITION

The juvenile court's finding that F.M. committed the crime of assault by means likely to produce great bodily injury is affirmed. The gang enhancement imposed under Penal Code section 186.22, subdivision (b)(1)(B), is reversed. The cause is remanded to the juvenile court for a new disposition hearing which does not take into consideration the noted gang enhancement.

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BAUER., J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.